



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. E296 OF 2021

1. ISSA AHMED.....1ST PLAINTIFF
2. SAMATARMOHAMED.....2ND PLAINTIFF
3. MOHAMED ABDI DAYO.....3RD PLAINTIFF
4. HASSAN MUSSA.....4TH PLAINTIFF
5. KAMAL MOHAMED ABDULLAHI.....5TH PLAINTIFF
6. HASSAN ABDI ISSA.....6TH PLAINTIFF
7. KAMAR AHMED HAJI.....7TH PLAINTIFF
8. AHMED HASSAN ABDI.....8TH PLAINTIFF
9. KHADIJA MOHAMED ABDULLAHI.....9TH PLAINTIFF
10. MOHAMED AHMED.....10TH PLAINTIFF
11. RAHMA ISMAEL.....11TH PLAINTIFF
12. AMINA ABDINOOR.....12TH PLAINTIFF
13. KHALID SULEIMAN.....13TH PLAINTIFF
14. SOFIA KOCHALE.....14TH PLAINTIFF
15. ABDULNUR OSMAN.....15TH PLAINTIFF
16. ASLEI ISSA.....16TH PLAINTIFF

VERSUS

MOHAMED AL-SAWAE.....DEFENDANT

RULING

(In respect to the Preliminary Objection dated 27th September 2021)

Introduction

1. By a Plaint dated 6th August 2021, the Plaintiffs brought this suit against the Defendant for prayers that;

a) A declaration be and is hereby issued that the Defendant's planned developments on suit property parcel L.R No. Nairobi/Block/104/519 Ushirika Estate (Block U) are in breach of approvals registered in 1989 together with the City Planning regulations in respect to Ushirika Gated Apartments of 1989, and consequently null and void ab initio.

b) An order of permanent injunction does issue restraining the Defendant herein by himself and any other person acting on his behalf from in any felling the perimeter wall, encroaching further onto common estate parts and reserves and developing on the parcel of Land No. Nairobi/Block /104/519 Ushirika Estate (Block U).

c) Costs of the suit be borne by the Defendant.

2. The Defendant filed a memorandum of appearance and notice of preliminary objection both dated 27th September 2021. It delimited some six grounds, focusing on both the suit and the Notice of Motion application dated 21st September 2021. The grounds are reprised variously in this Ruling.

The Preliminary Objection

3. The Defendant's preliminary objection was raised on the following terms:-

a) The Honourable Court lacks jurisdiction to entertain the suit.

b) That under section 78 of the Physical and Land Use Planning Act 2019, the County Physical and Land Use Planning Liaison Committee shall hear appeals against the decisions made by the Planning Authority with respect to physical and land use development plans in the county.

c) That under section 61(4) of the Physical and Land Use Planning Act 2019, any party aggrieved with the decision of County Physical and Land Use Planning Liaison Committee may then appeal against that decision to the Environment and Land Court.

d) That the Plaintiffs herein have failed and/or neglected to exhaust the alternative means of dispute resolution as provided by the statute.

e) That the instant suit is therefore premature, frivolous and an abuse of the court process as this Court has no jurisdiction.

f) That furthermore, the Plaintiffs have raised environmental concerns which in the first instance fall within the ambit of the National Environment Management Authority and thereafter to the National Environment Tribunal by dint of Section 129 of Environmental Management Authority Act 1999 as was further held in the Court of Appeal decision in Kibos Distillers Ltd and 4 Others v Benson Ambuti Adega & 3 Others (2020) eKLR.

4. Pursuant to the directions of this Court issued on 29th September 2021, the Court directed the preliminary objection to be canvassed through written submissions. The Defendant's submissions were filed on 6th October 2021 while the Plaintiffs' submissions were filed on 17th October 2021.

Defendant's Submissions

5. The gist of the Defendant's submission is that this Court lacks jurisdiction to entertain the Plaintiff's Notice of Motion and the entire suit for lack of exhaustion of existing statutory dispute resolution mechanism established under the Physical and Land Use Planning Act No. 13 of 2019 and Environmental Management and Coordination Act No. 8 of 1999.

6. It was submitted that the Plaintiffs' case is in opposition to the Defendant's proposed construction project and that vide a letter dated 3rd May 2021, they had already written to Nairobi Metropolitan Services and several other government agencies objecting to the same.

7. On this aspect, it was submitted that on the basis of that letter to Nairobi Metropolitan Services, the Plaintiffs had already invoked the dispute resolution mechanism under the Physical Planning and Land Use Act 2019 and hence the first port of call for the Plaintiffs was with the County Liaison Committee established under Section 78(a) of the Physical Planning and Land Use Act which is mandated to hear and determine complaints and claims made in respect to applications submitted to the Planning Authority of the County.

8. In support of this position, the Defendant relied on the cases of **Angela Mbugua & 4 Others vs KO Holdings Limited & 2 others (2020) eKLR, KO Holdings Limited v County Government of Kiambu, Red Hill Kentmere Residents Association (Interested Party) [2019] eKLR and Mutanga Tea & Coffee Company Limited v Shikara Ltd & Another [2012] eKLR.**

9. The Defendant also submitted that the Plaintiffs' suit referred to some environmental concerns and as such the appropriate forum was the National Environment Management Authority (NEMA) and National Environment Tribunal (NET) as stipulated by section 129 of the Environmental Management and Coordination Act No. 8 of 1999. (EMCA).

10. It was the Defendant's further submission that the Plaintiff had sought redress from NEMA vide their letter dated 3rd May 2021 and as

such they ought to have filed an appeal at NET pursuant to section 129 (2) of EMCA before moving to this Court.

11. In support of this position, the Defendant relied on the Court of Appeal case of *Kibos Distillers Limited & 4 Others vs Benson Ambuti Andeko & 3 Others [2020] eKLR* and the case of *Speaker of the National Assembly v James Njenga Karume [1992] eKLR* and urged the Court to dismiss the suit for prematurely invoking its jurisdiction.

Plaintiffs' submissions

12. The Plaintiffs opposed the preliminary objection. The Plaintiffs contended that the suit and the motion was properly before this Court by dint of Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act.

13. It was the Plaintiffs' submission that the alternative dispute resolution mechanism established under EMCA and the Physical Planning and Land Use Act as submitted by the Defendant was not applicable in their case since they had not sought to invoke the dispute mechanisms of those government agencies by virtue of writing to them.

14. The Plaintiffs contended that they only sought the assistance of various government agencies vide the letters sent out between 3rd to 10th May 2021.

15. It was the Plaintiffs further contention that the provisions of EMCA and the Physical Planning and Land Use Act that were cited by the Defendant to challenge the jurisdiction of this court was only applicable in cases where a decision has been made and further where one was aggrieved by the said decision and hence filed an appeal.

16. According to the Plaintiffs, they had not made any application to the Planning Authorities and no decision had been made by either the Nairobi Metropolitan Services and NEMA to warrant the filing of an appeal before the County Physical Liaison Committee and NEMA/NET respectively.

17. The Plaintiffs urged the Court to dismiss the preliminary objection with costs and they referred to the cases of *Wainaina Kenyanjui & 2 Others v Andrew Ng'ang'a [2014] and Gideon Kibindu & 20 Others v Kenya Ports Authority & 3 Others [2020]*

Analysis and determination

18. I have considered the preliminary objection, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether the preliminary objection is merited.

19. The case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696* has been the watershed as to what constitutes preliminary objections. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR* also pellucidly captured the legal principle when it stated as follows:

"...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."

20. This statement of the law has been echoed time and again by the courts: see for example, *Oraro -v- Mbaja [2007] KLR 141*.

21. In *Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR* the Supreme Court stated that:-

"... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit".[emphasis added]

22. The Supreme Court again reconsidered the position of parties resorting to the use of preliminary objections and pronounced itself as follows in the case of *Independent Electoral & Boundaries Commission -v- Jane Cheperenger & 2 Others [2015] eKLR*.

"The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits." [emphasis added]

23. Since an issue going to the jurisdiction of this Court has been raised that issue must be dealt with *in limine*.

24. In *Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1 Nyarangi, JA* expressed himself as follows:

"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the

jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

25. The Supreme Court in the case of Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011, observed that:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

26. It therefore behoves this Court to consider and determine whether or not it has jurisdiction to entertain the instant proceedings.

27. Let be begin by analysing whether or not the Plaintiffs were required to exhaust the dispute resolution mechanism under EMCA prior to filing this suit.

28. **Section 129** of the Environmental Management and Co-ordination Act provides that: -

Appeals to the Tribunal

(1) Any person who is aggrieved by—

(a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;

(b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder

(c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;

(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

(3) Upon any appeal, the Tribunal may—

(a) confirm, set aside or vary the order or decision in question;

(b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or

(c) make such other order, including an order for costs, as it may deem just.

(4) Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.

29. In the case of Patrick Musumba vs National Commission & 4 others Nairobi [2016] eKLR, the court relied on the Court of Appeal Decision on Republic vs NEMA Ex parte Sound Equipment Ltd [2011] eKLR where the Court made it clear that;

“challenges to Environmental Impact Assessment study report and/or Environmental Impact Assessment Licenses shall be made to the National Environment Tribunal established under section 125 of Environment Management and Coordination Act. The tribunal should have been given the first opportunity and option to consider the matter. The Tribunal is the specialized body with

capacity to minutely scrutinize the Environmental Impact Assessment study report as well as the licences”.

30. The Plaintiffs wrote to NEMA on 3rd May 2021 seeking for NEMA’s intervention in respect to proposed Defendant’s project and the said letter was never responded to and hence no decision had been made by NEMA. In my view this could not have qualified to be an appeal to NEMA. Under EMCA there is no known provision for *appeal to NEMA (sic)*, the Act only envisages and provides for an appeal to NET. In view of the foregoing, I find that the Plaintiffs were not obligated to invoke the jurisdiction of National Environment Tribunal under section 125 and 129 of EMCA and the exhaustion of the alternative dispute resolution mechanism as provided for by EMCA could not have been applicable herein.

31. On the other limb of whether or not the Plaintiffs had exhausted the dispute resolution mechanism under the Physical Planning and Land Use Act, the Plaintiffs submitted that they had not made any appeals to the County Liaison Committee and hence they were not obligated to seek a remedy under the said Act. The Defendant on the other hand maintained that the invocation of the dispute resolution mechanism under the Physical Planning and Land Use Act had already been invoked by the letter dated 3rd May 2021 that was addressed to the Nairobi Metropolitan Services.

32. Of the prayers sought in the plaint, there was a declaration that the Defendant’s planned developments on suit property parcel L.R No. Nairobi/Block/104/519 Ushirika Estate (Block U) is in breach of approvals registered in 1989 together with the City Planning regulations in respect to Ushirika Gated Apartments of 1989.

33. It is evident from this prayer that the Plaintiff sought to challenge the Defendant’s proposed project which according to them was contrary to the City Planning regulations.

34. Section 78 of the Physical Planning and Land Use Act

The functions of the **County Physical and Land Use Planning Liaison** Committee shall be to: -

- a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;*
- b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;*
- c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and*
- d) hear appeals with respect to enforcement notices.*

Section 80 of the Physical and Planning Land Use Act

Appeal to a County Physical and Land Use Planning Liaison Committee

- 1) A person who appeals to County Physical and Land Use Planning Liaison Committee shall do so in writing in the prescribed form.*
- 2) A County Physical and Land Use Planning Liaison Committee shall hear and determine an appeal within thirty days of the appeal being filed and shall inform the appellant of the decision within fourteen days of making the determination.*
- 3) The chairperson of a County Physical and Land Use Planning Liaison Committee shall cause the determination of the committee to be filed in the Environment and Land Court and the court shall record the determination of the committee as a judgment of the court and published in the Gazette or in at least one newspaper of national circulation.*

35. In the Court of Appeal case of **Republic vs. National Environmental Management Authority Exparte Sound Equipment [2011] eKLR** it was stated;

“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what in, the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it..”

36. The gist of the said decision is that, where there is an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether a matter is exceptional, it is necessary for the court to examine carefully the suitability of the statutory tribunal in the context of the particular case and ask itself whether the statutory body had the powers to determine the issue at hand. It is common ground that the issue at hand in this matter was about physical planning and execution of an existing development plan. The issues were purely matters of planning and development that are covered under the Physical Planning and Land Use Act. For the aforesaid reasons, I am persuaded that the Plaintiff ought to have followed and exhausted the alternative mechanism provided by Parliament under the Physical Planning and Land Use Act before engaging the Environment and Land court.

37. In the case of *Kibos Distillers Ltd & 4 others vs Benson Ambuti Adega & 3 others [2020] eKLR*:

The Court of Appeal observed in part:

“As aptly stated by the Supreme Court in *Samuel Kamau Macharia and Another-vs- Kenya Commercial Bank Ltd and 2 Others (Supra)*, jurisdiction cannot be conferred by way of judicial craft and innovation. Likewise, I state jurisdiction cannot be conferred by the art and craft of counsel or a litigant drawing pleading to confer or oust the jurisdiction conferred on a Tribunal or another institution by the Constitution or statute”.

The court went further to state:

“..... further, I observe that the jurisdiction of the ELC is appellate under Section 130 EMCA. The ELC also has appellate jurisdiction under Section 15, 19 and 38 of the Physical Planning Act. An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.....”

38. I am guided by the above authority and find that Plaintiffs failed to demonstrate that there existed exceptional circumstances to warrant them to move this court before exhausting the mechanism set out in the Physical Planning Act.

39. In my considered view the Plaintiffs cannot have it both ways; they ought to have chosen one route and await its outcome. I equally see no reason why they could not have referred the matter to the Liaison Committee first as provided for in the Physical Planning and Land Use Act.

40. The Plaintiffs referred to the cases of *Wainaina Kenyanjui & 2 Others v Andrew Ng’ang’a [2014] and Gideon Kibindu & 20 Others v Kenya Ports Authority & 3 Others [2020]* where **Learned Lady Justice Pauline Nyamweya (as she then was)** and **Learned Justice Charles Yano** respectively had held that nothing barred the Environment and Land Court which has both original and appellant jurisdiction to hear disputes that would have in the first instance been determined in another forum. I have considered the said cases which in my opinion are not binding to this court in view of the existing decisions of the ***Kibos Court of Appeal judgment***. In any event the Court further notes that those decisions had been rendered prior to the Court of Appeal decision in the ***Kibos case (supra)***.

41. In conclusion, I am persuaded that the Plaintiffs herein ought to have exhausted the alternative mechanism of dispute resolution in the Physical Planning and Land Use Act before moving this court. In view of the foregoing, this court lacks original jurisdiction to entertain the suit in view of the existing alternative statutory dispute resolution mechanism. The upshot of the matter is that I find merit in the preliminary objection and the same is upheld. The Notice of Motion dated 21st September 2021, the Plaint dated 6th August 2021 and the entire proceedings are hereby struck out with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF OCTOBER 2021

E. K. WABWOTO

JUDGE

IN THE VIRTUAL PRESENCE OF :-

NONE APPEARANCE FOR THE PLAINTIFFS

NONE APPEARANCE FOR THE DEFENDANTS

COURT ASSISTANT: CAROLINE

E. K. WABWOTO

JUDGE